

THE MATTER OF ARBITRATION BETWEEN

AFSCME COUNCIL 65,)	
)	
Union,)	
)	
and)	HIRZING
)	GRIEVANCE
)	
MILLE LACS COUNTY,)	
)	
Employer.)	BMS Case No. 15-PA-0170
)	
)	

Arbitrator: Stephen F. Befort

Hearing Date: May 7, 2015

Post-hearing briefs received: June 9, 2015

Date of Decision: June 26, 2015

APPEARANCES

For the Union: Teresa L. Joppa

For the Employer: Pamela R. Galanter

INTRODUCTION

AFSCME Council 65 (Union), as exclusive representative, brings this grievance claiming that Mille Lacs County (County) violated the parties' collective bargaining agreement by placing Assistant County Attorney Mark Herzing on unpaid leave during the period from July 16, 2014 until November 4, 2014 while he was a candidate for the elected county attorney position. The County contends that it followed applicable guidelines in placing Mr. Herzing on unpaid leave following the determination of the Personnel Board of Appeals that Mr. Herzing's continued

employment during the election campaign period would constitute a conflict of interest. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the County violate the parties' collective bargaining agreement when it placed the grievant on an unpaid leave of absence while he was a candidate for the office of County Attorney? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

Article 3.

SCOPE OF AGREEMENT

Section B. The Employer retains the right to operate and manage all manpower, facilities and equipment; to establish functions and programs; to set up and amend budgets; to determine the utilization of technology; to establish and modify organizational structure; to select, direct and determine the number of personnel; to establish work schedules; and to perform any inherent managerial functions not specifically limited by this agreement.

Section D. A reference in this Agreement to State or Federal law will not be deemed to incorporate the referenced law into this Agreement.

Article 6.

HOURS OF WORK

Section A. The normal workweek for full time employees shall be 40 hours per week, except for authorized absences. Usual office hours are 8:00 AM to 4:30 PM. By arrangement and approval of County Attorney, an equivalent number of hours (40 hours per week) may be worked in a flexible work schedule as necessary to perform county business.

Article 14.

DISCIPLINE AND TERMINATION

Section A. Employer's Right to Discipline. The employer shall have the right to impose disciplinary actions on all employees for cause only, except as provided in Article 5, probationary period. Disciplinary actions include, but are not limited to

oral reprimand, written reprimand, suspension without pay, demotion and termination.

Article 16.
LEAVES OF ABSENCE

Section A. In the event it is necessary for an employee to be absent from work for reasons other than those provided in sick leave, vacation and jury duty, a written request for non-paid leave of absence must be made at least fourteen (14) calendar days prior to the effective date of the leave of absence.

Article 21.
NO STRIKES/NO LOCKOUT

Section B. No lockout shall be instituted by the Employer during the life of this Agreement provided Section A of this Article is not violated by the employees or the Union.

FACTUAL BACKGROUND

Mark Herzing has worked since 2005 as a full-time assistant county attorney in the Mille Lacs County Attorney's office. During that time, he has handled a variety of civil and criminal assignments. He is a lifelong resident of Mille Lacs County.

During 2014, Mr. Herzing contemplated running for the elected Mille Lacs County Attorney position. Mr. Herzing testified that he considered running against incumbent County Attorney Jan Jude because of some concerns about office policies and morale. The deadline for filing for the 2014 election was on June 3, 2014.

On June 2, 2014, Mr. Herzing made a telephone call to County Administrator Roxy Traxler to discuss his possible candidacy. He wanted to obtain guidance concerning a county policy adopted in 2012 which provided as follows:

An employee may be a candidate for partisan office or non-partisan office provided that no employee shall campaign during actual hours of work. Any employee seeking public office must notify the department head and the Personnel Director so that a determination, by the Personnel Board of Appeals, can be made as to whether the position that the employee occupies with the county would be in

conflict with the candidacy for the public office the employee is seeking. . . . If a finding of a conflict is made, the employee shall be required to take a leave of absence without pay until the first business day following the election at which the outcome of the election contest is determined.

Personnel Policy Manual.

During that telephone conversation, Ms. Traxler stated that she had recently discussed the policy with Personnel Director Lisa Herges, and they had formed the opinion that it would not be a conflict of interest for an assistant county attorney to run for office against an incumbent county attorney. Mr. Herzing filed for the election on June 3, 2014, and informed Ms. Jude of his decision on that same day.

Ms. Jude responded to the filing by restricting Mr. Herzing's duties, hours, and contact with other County employees. On June 25, at Ms. Jude's request, the County placed Mr. Herzing on paid administrative leave, ostensibly because of the stress co-workers were experiencing from Mr. Herzing's candidacy.

County Attorney Jude requested that the Personnel Board of Appeals (PBA) be convened to determine whether Mr. Herzing's continued employment while a candidate would constitute a conflict of interest. Ms. Herges notified the parties that the PBA would conduct a hearing on July 24 and invited each party to submit pre-hearing briefs. On July 23, the grievant and his attorney were informed that they would not be permitted to present any witness testimony at the hearing. Accordingly, the only materials submitted to the PBA were the pre-hearing briefs of the parties, some attachments to the briefs, and supplemental affidavits submitted by Mr. Herzing.

The PBA hearing took place on July 24, 2014. Two of the three members of the board participated – a tribal judge and a local attorney – while the third member recused herself because she had filed to run for a county board seat. Mr. Herzing's attorney, Sarah Lewerenz,

presented witness affidavits to the PBA. Ms. Jude and the County did not make any presentation.

The PBA sent its decision via email to Ms. Herges on July 15, 2014. The decision concluded that the Mr. Herzing's candidacy constituted a conflict of interest with his continued service as an assistant county attorney. The opinion noted that a web site controlled by Mr. Herzing's campaign had made negative comments about Ms. Jude's tenure as county attorney. The opinion went on to find that Mr. Herzing's candidacy "tends to undermine the public trust in the office . . . [and] is incongruous with his obligation to the public good." Approximately 15 minutes later, the County Board convened and ratified the decision of the PBA. The Board denied Ms. Lewerenz's request to comment on the PBA's recommendation.

On July 16, 2014, Personnel Director Hirges sent a letter to Mr. Herzing informing him of the County Board's decision to place him on an unpaid leave of absence for the duration of his candidacy for the office of county attorney. The letter offered COBRA continuation of group insurance benefits. In actuality, Mr. Herzing chose to spend down approximately 120 hours of accrued vacation time in a manner that enabled the continuation of his health insurance benefits without the need for COBRA contributions. Ms. Herges testified at the hearing that Mr. Herzing continued to accrue seniority, vacation leave, and sick leave while on unpaid leave.

A primary election for the county attorney race was held on August 12, 2014. The two survivors were Joe Walsh, a private attorney, and Mr. Herzing. Mr. Walsh won the general election in November 2014. Mr. Herzing returned to his position with the county attorney's office following the election.

POSITIONS OF THE PARTIES

Union

The Union initially asserts that no provision of the parties' collective bargaining agreement authorizes the County to place an employee on an involuntary leave except for disciplinary purposes. The Union contends that the County's placement of Mr. Herzing on an involuntary and unpaid leave should be considered to be disciplinary in nature since it was politically motivated retaliation for Mr. Herzing having filed for election. That action was without cause and violates the Article 14 of the parties' agreement. The Union additionally argues that the County's action constituted a lockout in violation of Article 21. As a remedy, the Union asks that Mr. Herzing be made whole for any losses suffered as a result of the improper placement on leave.

County

The County maintains that the placement of Mr. Herzing on leave complied with the process set out in the Personnel Policy Manual, and that the decision of the PBA cannot be challenged in this proceeding. The County additionally claims that placing Mr. Herzing on leave is consistent with the broad management rights provision of the parties' agreement which preserves the County's right to "perform any management function not specifically limited by this agreement." In this instance, the County argues, no other provision of the contract, including the discipline and no lockout provisions, limits the County's authority.

DISCUSSION AND OPINION

Management Rights

As with any contract interpretation case, the appropriate starting point for analysis is with the language of the parties' collective bargaining agreement. Here, the parties'

agreement is silent with respect to the matter of a leave of absence for an employee's internal political candidacy. The agreement does make tangential references to absences in two instances. First, Article 16 provides that an employee may make a request for a leave of absence for a reason other than sick leave, vacation and jury duty. Second, Article 14 states that the County may impose discipline, including a suspension without pay, for cause. Neither provision, however, is directly applicable to the instant context.

The parties disagree as to the import of this silence. The Union argues that the lack of an explicit involuntary leave provision means that the County lacks the authority to place Mr. Herzing on unpaid leave. The County, in contrast, claims that the County possesses inherent managerial rights that are bound only by affirmative contractual limitations.

As a basic principle, management possesses the right to manage and direct its operations, subject to the limitations established by law or a collective bargaining agreement. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 13-5 to 13-8 (7th ed. 2012). That principle is bolstered in this instance by the parties' agreement which contains a management rights clause that reserves to the County the power to perform any "inherent managerial function not specifically limited by this agreement." The key question in this proceeding, accordingly, is to determine whether the parties' agreement contains any provision restricting the right of the County to act as it did in this matter.

Discipline

The Union contends that the County's placement of Mr. Herzing on unpaid leave should be viewed as a de facto disciplinary event. The Union points out that the leave was involuntary and unpaid, essentially akin to a suspension without pay. The Union further

argues that the suspension was without cause, resulting in a violation of Article 14 of the parties' agreement.

In response, the County's argues that the reason for placing Mr. Herzing on leave was not due to misconduct, but because of the operation of a non-disciplinary conflict-of-interest policy. The Union's counter-response is that the imposed leave was politically motivated retaliation which at least one other arbitrator has found to constitute discipline. St. Charles and Law Enforcement Labor Services, BMS Case No. 02-PA-693 (Lundberg, 2002).

I have some sympathy for the Union's argument. County Attorney Jude did not react well to Mr. Herzing's candidacy. She requested a PBA hearing even though County Administrator Traxler apparently thought that such was unnecessary. And, the PBA/County Board hearing process was hardly a model of due process.

The rub, however, is that the Union's argument is really an attack on the PBA decision. The PBA determined that Mr. Herzing's candidacy created a conflict of interest warranting his placement on unpaid leave. Mr. Herzing did not challenge that decision by appealing to the Minnesota Court of Appeals. *See* Minn. Stat. §§ 375.67, 14.63. As a labor arbitrator, I have no authority to overturn the PBA's administrative determination. Since the PBA directed the placement on leave due to a conflict of interest finding made pursuant to a validly promulgated policy, I believe that it is beyond my power to determine that this unreviewed decision was really a ruse for politically motivated discipline.

Lockout

The Union contends that the involuntary placement of Mr. Herzing on unpaid leave status constitutes a lockout in violation of Article 21. The Union argues that the County's

action in withholding work and pay from Mr. Herzing operates as a lockout. In general, a lockout is defined as a denial of work to a group of employees for the purpose of either resisting union demands or serving as pressure for an employer's desired economic concession. THE DEVELOPING LABOR LAW 1733-34 (6th ed. 2012). The County's placement of Mr. Herzing on leave does not fit this definition. The County's action in placing Mr. Herzing on leave did not operate as a group pressure mechanism in furtherance of a bargaining position. It was, instead, a targeted response to the potential for conflicts posed by an employee's candidacy for elected office. The County's placement of the grievant on leave was not a prohibited lockout.

AWARD

The grievance is denied.

Dated: June 26, 2015

Stephen F. Befort
Arbitrator